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No. 82-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESTHER C. DICKMAN AND
ESTATE OF PAUL B. DICKMAN, DECEASED,
G. WENDELL SMITH, PERSONAL REPRESENTATIVE,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Is a failure to demand repayment of an interest-free demand loan a "transfer of property by gift" subject to the federal gift tax?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
I. Neither the Making of Interest-Free Demand Loans Nor the Failure to Demand Repayment of Such Loans Constitutes a Taxable "Transfer of Property by Gift"	8
A. The History of Congressional and Administrative Action Indicates that No Gift Tax Upon Interest-Free Demand Loans was Intended	9
B. Interest-Free Demand Loans Are Not "Transfers of Property by Gift"	19
C. "Property" Cannot be Equated to "Opportunity for Economic Benefit"	24
D. Taxation of Interest-Free Demand Loans as "Transfers of Property By Gift" Is Irreconcilable with Prior Positions of the IRS and Other Tax Law Provisions	27
II. Adoption of the Contention of the IRS by This Court Would Result in Enormous Difficulties and Great Unfairness	32
III. If Interest-Free Demand Loans are to be Subject to Gift Taxation, it is the Congress Which Should Impose Any Such Tax	38
CONCLUSION	43

TABLE OF AUTHORITIES

Page

CASES:

Abbott v. United States, 74-2 U.S.T.C. (CCH) ¶ 13,040 (S.D. Miss. 1974) 29

Abkco Industries, Inc. v. Commissioner, 482 F.2d 150 (3rd Cir. 1973) 38

Allen v. Commissioner, 57 T.C. 12 (1971) 29

American Automobile Association v. United States, 367 U.S. 687 (1961) 41

Arrowsmith v. Commissioner, 344 U.S. 6 (1952) 39

Baker v. Commissioner, 677 F.2d 11 (2d Cir. 1982) 28,39

Beaton v. Commissioner, 664 F.2d 315 (1st Cir. 1981) 28,39

Bradford v. Commissioner, 34 T.C. 1059 (1960), *acq.*, 1961-1 C.B. 4 34

Brandtjen v. Kluge, Inc., 34 T.C. 416 (1960), *acq.*, 1960-2 C.B. 4 28

Bromley v. McCaughn, 280 U.S. 124 (1929) 24,27

Brown v. Commissioner, 37 T.C. 461 (1961), *aff'd*, 325 F.2d 313 (9th Cir. 1963), *aff'd*, 380 U.S. 563 (1965) 39

Burnet v. Guggenheim, 288 U.S. 280 (1933) 24

Caruth v. United States, 566 F.2d 901 (5th Cir. 1978) 19

Central Illinois Public Service Co. v. United States, 435 U.S. 21 (1978) 37,38

Central Tablet Manufacturing Co. v. United States, 417 U.S. 673 (1974) 27

Chamberlain v. Eddy, 154 Mich. 593, 118 N.W. 499 (1908) 10

Combs Lumber Co. v. Commissioner, 41 B.T.A. 339 (1940), *acq.*, 1940-1 C.B. 2 28

TABLE OF AUTHORITIES (Continued)

Page

Commissioner v. Brown, 380 U.S. 563 (1965) 41

Commissioner v. Greenspun, 670 F.2d 123 (9th Cir. 1982) 28,39

Commissioner v. Hogle, 165 F.2d 352 (10th Cir. 1947) 25

Commissioner v. Korell, 339 U.S. 619 (1950) 19

Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134 (1974) 27

Commissioner v. Smith, 324 U.S. 177 (1945) 42

Commissioner v. Wemyss, 324 U.S. 303 (1945) 23

Crane v. Commissioner, 331 U.S. 1 (1947) 19,22

Crown v. Commissioner, 67 T.C. 1060 (1977), *aff'd*, 585 F.2d 234 (7th Cir. 1978) 10,15,16,20,26,31,36,37,38

Dean v. Commissioner, 35 T.C. 1083 (1961), *nonacq.*, 1973-2 C.B. 4 28

Devine v. Stepanek, 176 Ill. App. 61 (App. Ct. 1912) 10

Dobson v. Commissioner, 320 U.S. 489 (1943) 38

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939) 18

Fondren v. Commissioner, 324 U.S. 18 (1945) 24

Fribourg Navigation Co. v. Commissioner, 383 U.S. 272 (1966) 19

Galatis v. Plasman, 80 So.2d 918 (Fla. 1955) 11

Gould v. Gould, 245 U.S. 151 (1917) 19

Gregory v. Helvering, 293 U.S. 465 (1935) 27

Grignon v. Shope, 100 Or. 611, 197 P. 317 (1921) 10

Hanover Bank v. Commissioner, 369 U.S. 672 (1962) 10,19

TABLE OF AUTHORITIES (Continued)

Page

Hardee v. United States, 82-2 U.S.T.C. (CCH) ¶ 9459 (Ct. Cl. 1982), *appeal pending* (Fed. Cir.) 28

Harris v. Commissioner, 340 U.S. 106 (1950) 8

Heiner v. Donnan, 285 U.S. 312 (1932) 8

Johnson v. United States, 254 F.Supp. 73 (N.D. Tex. 1966) 12,35,37,39

Jones v. Luing, 152 Iowa 276, 132 N.W. 371 (1911) 10

Kelley, Estate of v. Commissioner, 63 T.C. 321 (1974), *acq. and nonacq.*, 1977-2 C.B. 2 14,27

Lang, Estate of v. Commissioner, 64 T.C. 404 (1975), *acq.*, 1981-2 C.B. 2, *aff'd in part and rev'd in part*, 613 F.2d 770 (9th Cir. 1980) 14

LaRosa v. Commissioner, No. 29632-82 (T.C., filed Dec. 22, 1982) 34

Lewyt Corp. v. Commissioner, 349 U.S. 237 (1955) 19

Lorillard, Inc. v. Pons, 434 U.S. 575 (1978) 18

Martin v. Commissioner, 649 F.2d 1133 (5th Cir. 1981) .. 28,29

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 16

Old Colony Trust Co. v. Commissioner, 301 U.S. 379 (1937) 29

Parks v. Commissioner, 686 F.2d 408 (6th Cir. 1982) 28,29

Passailaigue v. United States, 224 F.Supp. 682 (M.D. Ga. 1963) 29

Peters v. United States, 624 F.2d 1020 (Ct. Cl. 1980) 19

Pretzer v. United States, 61-1 U.S.T.C. (CCH) ¶ 9477 (D. Ariz. 1961) 39

TABLE OF AUTHORITIES (Continued)

Page

Quinlivan v. Commissioner, 599 F.2d 269 (8th Cir. 1979), *cert. denied*, 444 U.S. 996 (1980) 10

Radovich v. National Football League, 352 U.S. 445 (1957) 41

Republic Petroleum Corp. v. United States, 397 F.Supp. 900 (E.D. La. 1975), *aff'd in part and rev'd in part*, 613 F.2d 518 (5th Cir. 1980) 14

Sanford's Estate v. Commissioner, 308 U.S. 39 (1939)..8,11,24

Small v. Commissioner, 28 T.C.M. (CCH) 1111 (1969) .. 13,27

Smith v. Shaughnessy, 318 U.S. 176 (1943)..... 23

Smith-Bridgman & Co. v. Commissioner, 16 T.C. 287 (1951), *acq.*, 1951-1 C.B. 3..... 41

Society Brand Clothes, Inc. v. Commissioner, 18 T.C. 304 (1952), *acq.*, 1952-2 C.B. 3 28

Sullivan v. Commissioner, 16 T.C. 228 (1951), *acq.*, 1951-1 C.B. 3 29

Suttle v. Commissioner, 625 F.2d 1127 (4th Cir. 1980).... 28,29

Thriftimart, Inc. v. Commissioner, 59 T.C. 598 (1973), *acq.*, 1973-2 C.B. 4 29

Threlfall v. United States, 302 F.Supp. 1114 (W.D. Wis. 1969) 29

United States v. Byrum, 408 U.S. 125 (1972) 19,38,41

United States v. Davis, 370 U.S. 65 (1962)..... 19,38

United States v. Gilmore, 372 U.S. 39 (1963)..... 30

United States v. Mason, 412 U.S. 391 (1973) 38

TABLE OF AUTHORITIES (Continued)

Page

STATUTES — FEDERAL:

Internal Revenue Code of 1954, as amended (26 U.S.C.):

Section 170(a) 29
Section 170(c) 29
Section 170(f)(3)(A) 29
Section 482 41
Section 483 17,39
Section 483(f) 40
Section 2501 8,13,18
Section 2501(a)(1) 2
Section 2503 8
Section 2503(b) 14,33
Section 2503(e) 36
Section 2511(a) 2,23
Section 2512(a) 2,20,21,22
Section 2522 30
Section 2522(c) 30
Section 6019 33
Section 6019(a) 14
Section 6621 4,17,35

28 U.S.C. §1254(1) (1983) 1

Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981) 18

§ 403(b)(3)(A) 14
§ 441(a) 14
§ 442(a)(1) 18
§ 807 42

Excise, Estate, and Gift Tax Adjustment Act of 1970, Pub. L. No. 91-614, 84 Stat. 1836 (1970) 18

§ 102(a)(1) 18
§ 102(a)(2) 18

Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539 (1966) 18

§ 109(a) 18

TABLE OF AUTHORITIES (Continued)

Page

Internal Revenue Code Amendments, Etc., Pub. L. No. 93-625, 88 Stat. 2108 (1974) 18

§ 14(a) 18

Public Law No. 95-427, § 1, 92 Stat. 996 (1978) 42

Public Law No. 96-167, § 1, 93 Stat. 1275 (1979) 42

Revenue Act of 1926, ch. 27, 44 Stat. 9 (1926):

§ 302(c) 8
§ 1200(a) 8

Revenue Act of 1932, ch. 209, §§ 501-531, 47 Stat. 169 (1932) 8

Revenue Act of 1942, ch. 619, 56 Stat. 798 (1942) 12

§ 124(a) 12

Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978) 18

Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969) 18,29

§ 201(a) 29

Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) 18

§ 1902(a)(10) 18
§ 1902(c)(1) 18
§ 1906(b)(13)(A) 18

Tax Treatment of Certain Payments, Pub. L. No. 89-365, 80 Stat. 32 (1966) 18

Technical Corrections Act of 1982, Pub. L. No. 97-448, § 104(a), 96 Stat. 2365 (1983) 18

STATUTES — STATE:

FLA. STAT. (1981):

§ 687.02 35
§ 733.607 11

TABLE OF AUTHORITIES (Continued)

Page

TREASURY REGULATIONS:

Reg. 79 (U.S. Treas. Dept., Bureau of Internal Revenue, *Regulations 79, relating to Gift Tax under the Revenue Act of 1932* (1933)) 12

Reg. 108 (8 Fed. Reg. 10858 (1943)) 12

TREASURY REGULATIONS (26 C.F.R.):

§ 1.170A-7(d) 30
§ 1.482-1(d) 42
§ 1.482-2 42
§ 1.483-1(c) 40
§ 1.483-1(d) 40
§§ 25.2501-1 — 25.7101-1 (T.D. 6334, 1958-2 C.B. 627) 12
§ 25.2511-1(c) 2
§ 25.2511-2(a) 2,34
§ 25.2512-1 3,20,36
§ 25.2512-5 (T.D. 6334, 1958-2 C.B. 627) 35

REVENUE RULINGS:

I.T. 3918, 1948-2 C.B. 33 29

Rev. Rul. 55-713, 1955-2 C.B. 23 27,28

Rev. Rul. 64-328, 1964-2 C.B. 11 28

Rev. Rul. 66-167, 1966-1 C.B. 20 25

Rev. Rul. 67-79, 1967-1 C.B. 117 41

Rev. Rul. 70-237, 1970-1 C.B. 13 25

Rev. Rul. 73-61, 1973-1 C.B. 408 14,20,34

Rev. Rul. 81-260, 1981-2 C.B. 244 35

MISCELLANEOUS:

B. BITTKER, FEDERAL INCOME TAXATION OF INCOME, ESTATES AND GIFTS (1981) 26

TABLE OF AUTHORITIES (Continued)

	Page
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING AND MONETARY STATISTICS 1914-1941 (1976)	21
65 Cong. Rec. 8095-96 (daily ed., May 8, 1924) (remarks of Rep. Green)	8
69 Federal Reserve Bulletin (January 1983)	35
H. REP. NO. 708, 72nd Cong., 1st Sess. (1932), *reprinted in* 1939-1 C.B. (Part 2) 457	8,23
H. REP. NO. 2333, 77th Cong., 2d Sess. (1942), *reprinted in* 1942-2 C.B. 372	12
H. REP. NO. 2508, 87th Cong., 2d Sess. (1962), *reprinted in* 1962-3 C.B. 1129, 1146-47	42
N.Y. Times, May 1, 1983, § 1, at 60, col. 3	9
S. REP. NO. 665, 72nd Cong., 1st Sess. (1932), *reprinted in* 1939-1 C.B. (Part 2) 496	8,23
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Wall Street Journal, The, Feb. 2, 1983, at 1, col. 5	34

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. A.* 1a-14a) is reported at 690 F.2d 812 (1982). The opinion of the United States Tax Court is unofficially reported at 41 T.C.M. (CCH) 620 (1980) (Pet. A. 15a-24a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1982. The Petition for Writ of Certiorari was granted by this Court on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1983).

*Pet. A. refers herein to the Appendix to the Petition for Writ of Certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Internal Revenue Code of 1954, as amended (26 U.S.C.):

I.R.C. § 2501(a)(1) imposes a gift tax:

> "on the transfer of property by gift. . . ."

I.R.C. § 2511(a) provides in part:

> "[T]he [gift] tax . . . shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. . . ."

I.R.C. § 2512(a) provides:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

Treasury Regulations (26 C.F.R.):

Treas. Reg. § 25.2511-1(c) provides in part:

> "Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax."

Treas. Reg. § 25.2511-2(a) provides in part:

> "The gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer. . . . On the contrary, the tax is . . . an excise

upon [the donor's] act of making the transfer [and] is measured by the value of the property passing from the donor . . ."

Treas. Reg. § 25.2512-1 provides in part:

"The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts."

STATEMENT OF THE CASE

Petitioner Esther C. Dickman (hereinafter "Esther") is an individual residing in Hillsborough County, Florida. Petitioner G. Wendell Smith, Personal Representative, is the duly qualified personal representative for the Estate of Esther's deceased husband, Paul B. Dickman (hereinafter "Paul"), who died on December 22, 1976 (Pet. A. 17a). Paul and Esther were early settlers in the small town of Ruskin, Florida, who, despite difficult times in the 1930's, achieved success in agricultural and real estate business pursuits (Pet. A. 18a).

Artesian Farms, Inc. (hereinafter "Artesian") is a Florida corporation engaged in farming and in operating a motel and restaurant. Artesian was owned at all times relevant hereto by Paul, Esther, their son, Lyle, and Lyle's wife and three children (Pet. A. 17a-18a).

During the calendar years 1971 through 1976, Paul and Esther had several demand loans outstanding (hereinafter the "Loans") to Lyle and to Artesian. All of the Loans were payable upon the demand of the lender and were interest-free. With two exceptions, all of the Loans were evidenced by properly executed

promissory notes containing such terms.[1] Several partial repayments of the Loans were made during the years at issue, but significant amounts remained outstanding at Paul's death in 1976, which occurred approximately six months after the death of his son, Lyle (Pet. A. 18a-20a). There is no question that the Loans were in fact bona fide.[2] The full amount of the outstanding Loans made by Paul was included as a part of his taxable estate.

Respondent Commissioner of Internal Revenue (hereinafter "IRS") determined deficiencies in Paul and Esther's federal gift taxes for all calendar quarters in the years 1971 through 1976 (Pet. A. 21a). The deficiencies asserted in these six years were in the aggregate sum of $83,322.69 (Pet. A. 15a-16a).[3] These claimed deficiencies were based on a determination by the IRS that the failure to demand repayment of the Loans constituted taxable gifts during each calendar quarter to the extent of the "value of the use" of the amounts loaned (Pet. A. 21a). In determining the amount of the alleged "gift," the IRS did not make any factual determination as to the market value of such use or as to the use, if any, to which the sums loaned would have been put by Paul and Esther. Instead, the IRS simply applied the interest rates established under I.R.C. § 6621 — rates applicable for determining interest due on underpayments or refunds of tax — to the loan balances outstanding at the end of each taxable quarter, and denominated the result as the amount of "gifts" by Paul and Esther (Pet. A. 21a).

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[1] One exception was an open-account loan payable on demand (Pet. A. 19a-20a). The second exception was a loan which in form was a term loan but which the Tax Court found as a fact to be in substance a demand loan (Pet. A. 20a, 23a-24a).

[2] The Tax Court stated: "Respondent [IRS] makes no argument that any loan was not in fact bona fide" (Pet. A. 22a n.4). There is no suggestion in the record that the Loans were not in good faith intended by all parties to be repaid, or that there was any agreement, implicit or otherwise, that payment of the loans would not be demanded for any period of time. Nor is there any suggestion that the loans were motivated by any effort to avoid taxes in any respect, or that the borrowers were insolvent or otherwise incapable of repaying them at any time.

[3] The parties since have determined that the calculation of deficiencies should be revised in certain respects not at issue herein (Pet. A. 16a n.1).

SUMMARY OF THE ARGUMENT

The gift tax is imposed upon the "transfer of property by gift." Congress never intended these words to be read to include the making of a valid interest-free demand loan, or the failure to demand repayment of such loan at a particular time.

Interest-free loans of money or other property within families are a common and important part of American life, and have been since long before enactment of the present gift tax law by Congress in 1932. For example, a woman lends her sister money to pay large medical bills occasioned by a serious operation, with no thought that interest should be required nor that a gift is being made. Further, the legislative history of the gift tax law makes no reference to loans as potential vehicles for "gifts." The IRS, for at least thirty years after enactment of the gift tax law, did not claim that a valid interest-free demand loan could give rise to a taxable gift.

Since the IRS first contended in the mid-1960's that an interest-free demand loan could result in a taxable gift, its position had been squarely rejected by every court that considered it until the decision of the Court of Appeals below. Despite these adverse court decisions, the IRS neither sought nor obtained Congressional alteration of the gift tax law on this issue. Congress amended the gift tax law in 1966, 1969, 1970, 1974, 1976, 1978 and 1981 without any suggestion of disagreement with the decided case law.

Analysis of the language of the gift tax statute in accordance with its ordinary meaning also leads to the same result — neither the making of a valid interest-free demand loan, nor the failure to demand repayment of it at a particular time, result in a

"transfer of property by gift." The IRS has recognized that no taxable "transfer" occurs at the time of the loan — the only time at which a "transfer" could be said to occur. Further, a failure to demand repayment over a period of time cannot fairly be characterized as a continuous series of minute "transfers of property" during that period. The contention of the IRS in this case rests not on the language of the gift tax law, but upon a theory which would tax every failure to act which creates a potential economic benefit to others. Congress plainly did not intend to cast the net of gift taxation so far beyond the words of the statute. A taxable "transfer of property" cannot be equated with a non-taxable "opportunity for economic benefit."

Moreover, any adoption of such a theory by this Court would generate wide-ranging practical problems. The value of a failure to obtain maximum compensation for another's use of one's property would have to be determined on the basis of the facts and circumstances of each case, not by application of an arbitrary interest rate such as the rate put forth by the IRS in this case. Valuation trials requiring testimony on a borrower's creditworthiness and various market rates of interest, all for multiple years, would further burden already crowded court dockets. Taxpayers would be required to keep records of multitudinous intra-family "transfers" of benefits and opportunities and government and taxpayer alike would be placed in the difficult position of having to determine the gift tax value of such "transfers" both administratively and judicially. Imposition of a rule which would create such vagarious results would be illogical, and retroactive imposition would be manifestly unfair.

Further, adoption of a broad rule that interest-free demand loans give rise to taxable gifts would produce obviously unintended anomalies. An outright gift of money to charity would not be a taxable gift but would give rise to an income tax

deduction, while an interest-free loan to that charity would be a taxable gift but no income tax deduction would be allowed. Outright payment of another's college tuition or medical expenses would be exempt from gift tax, while an interest-free loan made for such purposes would result in a taxable gift. The gift tax on an interest-free loan could be greater than the gift tax on an outright gift of the same sum.

The imposition of a tax on interest-free demand loans is clearly a matter best suited for legislative rather than judicial determination. Not only does this issue involve far-reaching matters of tax policy, but it also requires a comprehensive and workable system for taxation of such loans — if any taxation is appropriate. Only Congress is in a position to develop such a system. The need to avoid imposing such a tax retroactively on unsuspecting taxpayers, the desirability of public participation in the framing of applicable rules, and the need to minimize otherwise serious administrative and reporting problems by adopting "safe-harbor" rates and appropriate exceptions, all argue for a Congressional resolution of the issues before this Court.

For all of these reasons, this Court should reverse the decision of the Court of Appeals, and the IRS should direct any economic or tax policy arguments for taxation of loans such as the loans made by the Dickmans to the body whose constitutional role it is to enact the tax laws.

ARGUMENT

I. Neither the Making of Interest-Free Demand Loans Nor the Failure to Demand Repayment of Such Loans Constitutes a Taxable "Transfer of Property by Gift."

In 1932 Congress enacted the modern gift tax law, imposing a tax upon "the transfer of property by gift." I.R.C. § 2501. In order to achieve its primary objective of preventing evasion of the estate tax by *inter vivos* gifts,[4] Congress used broad language so as to subject all such transfers to taxation, whether the property be tangible or intangible and whether the gift be effected directly or indirectly. I.R.C. § 2503. Since enactment of the law, however, Congress has never expanded the essential scope of the tax in any respect, or altered the definition of the controlling statutory terms. Unless there is a "transfer of property by gift" within the intention of Congress, a transaction is not subject to gift taxation under our law.

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[4]Congress' primary objective in enacting the gift tax in 1932 was to supplement the estate tax. "In short, the design is to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax." S. REP. No. 665, 72nd Cong., 1st Sess. 40 (1932), *reprinted in* 1939-1 C.B. (Part 2) 496, 525; H. REP. No. 708, 72nd Cong., 1st Sess. 28 (1932), *reprinted in* 1939-1 C.B. (Part 2) 457, 477. Congress' objective has been recognized by this Court. *E.g., Harris v. Commissioner, 340 U.S. 106, 107 (1950); Sanford's Estate v. Commissioner,* 308 U.S. 39, 44 (1939).

Similarly, the predecessor to the 1932 gift tax statute was enacted in 1924 as a "corollary" or as "supplemental" to the estate tax. 65 Cong. Rec. 8095-96 (daily ed., May 8, 1924) (remarks of Rep. Green). Prior to 1926, the estate tax included a presumption that gifts made within two years of death were made in contemplation of death and were therefore subject to the estate tax. Congress established this presumption as irrebuttable in the Revenue Act of 1926. Revenue Act of 1926, ch. 27, § 302(c), 44 Stat. 9 (1926). At that time Congress also repealed the 1924 gift tax statute. *Id.*, § 1200(a). A gift tax was reinstituted in 1932 following the Supreme Court's decision in *Heiner v. Donnan,* 285 U.S. 312 (1932), that the presumption violated the Fifth Amendment of the United States Constitution. Revenue Act of 1932, ch. 209, §§ 501-531, 47 Stat. 169 (1932). Without such presumption, the gift tax again was necessary to prevent avoidance of the estate tax through the use of *inter vivos* gifts.

The decision of the Court of Appeals below represents the first and only occasion in the fifty-one year history of the gift tax law in which any court has held that failure to demand repayment of a bona fide interest-free demand loan constitutes a taxable "transfer of property by gift." In so holding, the Court of Appeals embraced a position of the IRS which was first asserted over thirty years after enactment of the law, and which has been squarely rejected by three courts. This position — simply stated — is that the mere opportunity to use property, even for a moment and subject to withdrawal at any time, is itself a "transfer of property by gift" which Congress intended to tax. Because the decision of the Court of Appeals would apply the gift tax in circumstances which are far beyond both the letter and purpose of the statute, it should be reversed and the decision of the Tax Court should be affirmed in all respects.

A. The History of Congressional and Administrative Action Indicates that No Gift Tax Upon Interest-Free Demand Loans was Intended.

In 1932, as today, interest-free demand loans within families were common features of American life, made for reasons wholly apart from tax considerations.[5] Indeed, the members of Congress in that year likely would have deemed most unusual any instance in which a father insisted upon interest from his adult daughter on money which he loaned her to pay for her medical expenses, or in which a farmer charged his adult son for the temporary use of farm animals or equipment or for a loan to buy seed for the planting of crops. Is there reason to believe that the same Congress nevertheless intended to cause such loans to result in taxable "transfers of property by gift" in the absence of such charges?

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[5] Interest-free loans among non-family members have also long been a means for providing assistance to those in need. The Hebrew Free Loan Society has been making interest-free loans to immigrants in New York City since 1892. These loans are used to enable an immigrant to make a start, to help tide over a family or an elderly person in a crisis situation, or otherwise to assist individuals. Since its inception in 1892, the Society has loaned without interest over $82 million, virtually all of which has been repaid. N.Y. Times, May 1, 1983, §1, at 60, col. 3.

No evidence of such an intention can be found in any of the legislative history of the gift tax law. *See Crown v. Commissioner*, 585 F.2d 234, 237-39 (7th Cir. 1978). There is no suggestion by Congress that a bona fide loan might somehow be recharacterized as a "gift of the use of property" and subjected to taxation. To the contrary, it must be concluded that Congress used the terms "transfer of property by gift" in the literal, non-technical and ordinary sense in which they were used at that time. *See, e.g., Hanover Bank v. Commissioner*, 369 U.S. 672, 687-88 (1962); *Quinlivan v. Commissioner*, 599 F.2d 269, 271 (8th Cir. 1979), *cert. denied*, 444 U.S. 996 (1980). Any such reading of the statutory terms precludes the recharacterization which the IRS now seeks to effect.

The simple truth is that a bona fide interest-free demand loan was an inherently different transaction than a "transfer of property by gift" both to Congress and to the average American citizen in 1932. When such a loan was made, the lender had *not* given away his money or property; he expected it back and had the legal right to recover it in full whenever he chose to do so. Although the borrower might have made use of the money or property temporarily, he would never have claimed that he had received a "gift." Indeed, he likely would have protested any such assertion — he knew that he would have to pay back every cent borrowed.[6]

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[6]Similarly, judicial decisions of the period clearly distinguished between a gift and a loan. A "gift" involved an absolute and irrevocable transfer of property:

> The delivery of such a gift must be not only of possession, but also of dominion and control of the property. The title must be absolute and . . . must be so complete that if the donor again resumes control of it without the consent of the donee he becomes liable as a trespasser.

Grignon v. Shope, 100 Or. 611, 197 P. 317, 319 (1921). Accordingly, there was no gift where certificates of deposit were delivered by the transferor on the condition that "in case I need it you will have to give it to me; if I do not need it you will keep it." *Devine v. Stepanek*, 176 Ill. App. 61 (App. Ct. 1912). *Accord, Jones v. Luing*, 152 Iowa 276, 132 N.W. 371 (1911) (no gift where property transferred on condition that donor die without needing it); *Chamberlain v. Eddy*, 154 Mich. 593, 118 N.W. 499 (1908) (no gift where donor reserved the right to call back the property at any time before death).

The conclusion that Congress did not intend bona fide loans to result in taxable gifts also is confirmed by a consideration of the primary Congressional purpose in enacting the gift tax law: "to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." *Sanford's Estate v. Commissioner*, 308 U.S. 39, 44 (1939). When a person makes a bona fide demand loan of property, there is no basis for assuming that the property will not be in his estate upon his death and subject to estate taxation. To the contrary, the loans typically will either be repaid during his lifetime or will be repaid upon a demand by his estate.[7] In either event, the loan is neutral with respect to the amount of his estate and the estate tax thereon — as it was in the case of Paul Dickman.[8] For this reason, there is no basis whatsoever for inferring that Congress intended to impose a gift tax in connection with such a loan.

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[7] The executor will have a fiduciary duty to demand repayment. *E.g.*, FLA. STAT. § 733.607 (1981); *Galatis v. Plasman*, 80 So. 2d 918 (Fla. 1955).

[8] No situation could more clearly illustrate both this fact and the typical lack of estate tax motivation of bona fide interest-free demand loans than that now before the Court. Although Paul and Esther Dickman had three grandchildren active in the business of Artesian, they made the loans to the business itself or to their son, Lyle (Pet. A. 18a). Lyle actually predeceased Paul, and his estate exceeded Paul's by far more than the amount of the loans to Lyle (Pet. A. 18a). If estate tax minimization had been Paul and Esther's objective, the loans logically would have been made to their grandchildren. Indeed, if the loans to Lyle resulted in any increase in his estate, the increase potentially was taxable in a higher bracket than that in which the same sums would have been taxed in Paul's estate. Moreover, the full value of the outstanding loans at Paul's death were taxed in his estate. The loans at issue therefore plainly were not designed to avoid the estate tax, and did not have that effect. Many intra-family loans are used by the borrower for business or personal purposes, rather than to earn interest or other passive investment income. For example, in this case, although Paul and Lyle were deceased at the time of trial and could not testify as to the use of the Loans, the fact that a portion of the Loans were made to the corporation certainly suggests that they were to be used in the corporation's business pursuits. It is difficult to understand why a gift tax based on imputed interest should be imposed on such loans for personal or business purposes.

It is the history of the administration of the gift tax law by the IRS, however, that provides perhaps the most convincing proof that Congress did not intend to impose a gift tax on bona fide interest-free demand loans. For over thirty years after enactment of the law, the IRS never took a position on record that an interest-free demand loan involved any taxable gift. It was only after decades of this practice, and without further Congressional guidance[9] or new regulations,[10] that such a claim was first advanced in *Johnson v. United States*, 254 F.Supp. 73 (N.D. Tex. 1966).

Johnson involved demand loans from parents to their two children, evidenced in part by promissory notes and in part by open accounts. The IRS imposed a gift tax based upon 3½ percent of the loan balances for each year at issue, contending that "Mr. and Mrs. Johnson made a gift to their children of the value of the use of the money." 254 F.Supp. at 73. The district

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[9] The conclusion that Congress historically has not intended bona fide loans to result in taxable "transfers of property by gift" is further supported by changes Congress made to the bad debt loss rules in the Revenue Act of 1942, ch. 619, 56 Stat 798 (1942). The Act created the statutory distinction between business and non-business bad debts, permitting only capital loss treatment for the latter. *Id.*, § 124(a). The relevant committee report uses examples of a loan to a friend or a relative to describe non-business debts, indicating that Congress was well aware of the common practice of such loans. H. REP. NO. 2333, 77th Cong., 2d Sess. 45 (1942), *reprinted in* 1942-2 C.B. 372, 408-09. Although Congress was not willing to permit an ordinary loss deduction in such instances, there was no suggestion that loans to friends or relatives might be considered to constitute "gifts," even after a total failure of repayment. Indeed Congress' allowance of a capital loss deduction in connection with such loans is irreconcilable with any recharacterization of them as "gifts," for which *no* income tax deduction would be permissible.

[10] The various Treasury Regulations under the gift tax law have never addressed interest-free or low-interest loans. Treas. Reg. 79 (U.S. Treas. Dept., Bureau of Internal Revenue, *Regulations 79, relating to Gift Tax under the Revenue Act of 1932* (1933), with periodic amendments); Treas. Reg. 108 (8 Fed. Reg. 10858 (1943), with periodic amendments); Treas. Reg. §§ 25.2501-1 — 25.7101-1 (T.D. 6334, 1958-2 C.B. 627, with periodic amendments).

court rejected the claim that these loans involved gifts within the meaning of I.R.C. § 2501, noting that the loans were genuine and had been substantially repaid prior to Mr. Johnson's death.

In reaching this decision, the court relied upon two primary considerations, each of which is fully applicable here. First, the court emphasized that interest-free loans do not reduce the amount of the lender's estate. In fact, in *Johnson*, as in this case, "the unpaid amount of the loans appeared on the books, and was includible as an asset of [Mr. Johnson's] estate in arriving at the amount of his estate taxes." 254 F.Supp. at 77. The only effect of such loans on the estate tax is that the lenders *might* have used their funds so as to generate income, which they *might* not have consumed in some way; if so, their estates would have been greater. The court concluded that deterring reduction of the theoretical potential estate, as opposed to the actual estate, was not within the purposes of the gift tax law. Second, the court recognized that any expansion of the gift tax like that sought by the IRS should not be attempted through the judicial process: "Passage of a law providing for a tax like the one here contended for should be sought through Congress instead of the courts." 254 F. Supp. at 77.

The IRS chose in 1966 not to appeal the *Johnson* decision and did not indicate its disagreement with it nor seek any Congressional action to overrule it. In the years following *Johnson*, cases appeared in which the IRS appeared to abandon its position in *Johnson*. For example, in *Small v. Commissioner*, 28 T.C.M. (CCH) 1111 (1969), the court found that a transfer of property in return for promissory notes bearing no interest constituted a taxable gift to the extent that the fair market value of the property exceeded the buyer's principal obligation under the notes. There was no claim by the IRS, however, that the

alleged gifts should be increased because of the interest-free characteristic of the notes.[11]

Such was the state of the law in 1971, the first year in which the IRS claims Paul and Esther Dickman owed gift taxes for the loans at issue here. In 1973, however, the IRS announced its disagreement with the seven-year old *Johnson* decision, and reasserted its position which was rejected in that case. In Rev. Rul. 73-61, 1973-1 C.B. 408, it stated that an interest-free demand note results in a taxable gift. Although admitting that "the value of the right to the use of the money loaned was not ascertainable at the date of the exchange," 1973-1 C.B. at 409, the IRS contended that the value of the taxable gift could be assessed on the last day of each calendar quarter during which the borrower had had use of the money.[12] No specific method for

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[11] *Accord, Estate of Kelley v. Commissioner*, 63 T.C. 321 (1974), *acq. and nonacq.*, 1977-2 C.B. 2. In *Estate of Lang v. Commissioner*, 64 T.C. 404 (1975), *acq.*, 1981-2 C.B. 2, *aff'd in part and rev'd in part*, 613 F.2d 770 (9th Cir. 1980), the IRS successfully claimed that a taxable gift of the principal of interest-free notes executed from 1962 to 1967 was made when the taxpayer permitted the statute of limitations to run on suit on the notes. Again, the IRS made no contention that gifts were made during the life of the notes because they bore no interest. In *Republic Petroleum Corp. v. United States*, 397 F.Supp. 900, 917-18 (E.D. La. 1975), *aff'd in part and rev'd in part*, 613 F.2d 518 (5th Cir. 1980), the IRS argued that cancellation of interest at a rate of two percent on a loan constituted a taxable gift. There was no claim, however, that the two percent rate was not full and adequate consideration for the loan, and thus in itself a taxable gift of the use of money.

[12] For calendar years prior to 1971, a donor was required to file a gift tax return for any calendar year in which he made a transfer of a future interest in property or of a present interest to any one donee exceeding $3,000 in value. Between 1971 and 1981, gift tax returns were due on a calendar quarter basis, beginning with the quarter in which the donor made a transfer of a future interest or a present interest in excess of $3,000. The annual filing requirement was reinstated in 1982 in lieu of quarterly filings. I.R.C. § 6019(a), *as amended by* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(b)(3)(A), 95 Stat. 172 (1981). At the same time, the annual exclusion amount of $3,000 was increased to $10,000. I.R.C. § 2503(b), *as amended by* Economic Recovery Tax Act of 1981, *supra*, § 441(a).

assessing such value was suggested; the IRS stated only that, although the value was "usually stated in terms of interest or some other equivalent in money or money's worth," the appropriate rate of interest "may vary, depending upon the actual circumstances pertaining to the transaction." 1973-1 C.B. at 409.

The IRS first sought to invoke Rev. Rul. 73-61 in the Tax Court in *Crown v. Commissioner*, 67 T.C. 1060 (1977), *aff'd*, 585 F.2d 234 (7th Cir. 1978). There, the IRS claimed that substantial interest-free demand loans from a partnership to trusts for the benefit of the partners' children and other relatives constituted taxable gifts. It sought to value the alleged gifts by applying a six percent interest rate to the loan balances, a rate that was slightly above the prime rate of interest and deemed "reasonable" by the IRS.

The Tax Court stated its agreement with the *Johnson* decision and rejected the position of the IRS and Rev. Rul. 73-61. After reviewing the reasoning of the court in *Johnson*, the Tax Court stated:

> The Commissioner was concerned . . . that the ultimate estate would be reduced by the amounts of money which the lender *could have* earned with the loaned funds during the period of the loans. However, that approach was properly rejected by the District Court because our income tax system does not recognize unrealized earnings or accumulations of wealth and no taxpayer is under any obligation to continuously invest his money for a profit. The opportunity cost of either letting one's money remain idle or suffering a loss from an unwise investment is not taxable merely because a profit *could have been made* from a wise investment.

67 T.C. at 1063-64.

As in *Johnson*, the Tax Court in *Crown* suggested that Congressional action should be forthcoming before such loans could be subjected to taxation. *Id.* But the Tax Court noted the substantial practical difficulties which might counsel against such legislation:

> Moreover, there are policy considerations which militate against viewing the value use of money or property as a taxable event for gift tax purposes. If respondent's position herein were sustained, the principle established could be extended to a multitude of situations involving gratuitous use or sharing of real or personal property among relatives. The application of the gift tax to common intrafamily sharing of use of property seems administratively unmanageable, and such situations point up the difficulty with the concept of gift taxation attaching to mere permissive use. Thus, we are inclined to follow in this area Justice Holmes' admonition that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

67 T.C. at 1065.

The IRS appealed, but the Seventh Circuit Court of Appeals affirmed the Tax Court's decision. *Crown v. Commissioner*, 585 F.2d 234 (7th Cir. 1978). After examining at length several economic arguments for taxing the right to use money, the Seventh Circuit concluded that an interest-free demand loan could not fairly be characterized as a "transfer of property by gift" within the meaning of the gift tax statute. Again, the Court noted the serious difficulties with judicial, rather than legislative, acceptance of the claim of the IRS:

> Another problem with adopting the judicial construction urged by the Commissioner is the extremely broad potential reach of the principles that would be at least implicitly recognized. The same reasoning that leads to the finding of

> a taxable gift when $18 million is loaned by a parent to his children for investment purposes would find a gift where a father lends a thousand dollars to his son graduating from college until he can get established, or even where an office worker lends a fellow employee $10 "until next payday." Similar reasoning might find the presence of a gift when a neighbor borrows your lawnmower and fails to return it immediately, or when out-of-town guests are provided a night's lodging by friends instead of going to a hotel. As in Section 483, it might be desirable to set out a clear set of rules exempting from taxation certain types of property and/or transactions below some threshold duration or dollar value.

585 F.2d at 241 (footnote omitted).

Again, the IRS chose neither to seek further review of the decision against it nor to recommend alteration of the gift tax statute by Congress, and no regulations on the subject of such loans were promulgated. Instead, the IRS inadvertently demonstrated the validity of the Seventh Circuit's concern with the absence of legislative guidance by imposing a tax on the Dickmans in this case based on an entirely different rate of interest than that which it asserted in *Crown* or in *Johnson* — the rate prescribed by I.R.C. § 6621 and applicable to determine interest due on underpayments or refunds of tax. The Tax Court in this case reaffirmed its previous decision in *Crown*, but the Eleventh Circuit Court of Appeals reversed the Tax Court's decision.

Thus, prior to the decision of the Court of Appeals below, the fifty-one year history of the gift tax law could be divided into two periods. In the first period of more than thirty years, interest-free demand loans were common but there is no evidence that either Congress or the IRS believed them to have any gift tax consequences. In the second period of less than twenty years, the

IRS tried on several occasions without success to subject such transactions to gift taxation, without any change in the original statutory provisions. Despite its uniform lack of success in this era, the IRS neglected or refused to take its case to Congress. And Congress, presumably with knowledge of these decisions, amended the gift tax law during this latter period on eight occasions, twice in 1966, and once in 1969, 1970, 1974, 1976, 1978 and 1981.[13] It made no change whatsoever in the basic scope of the gift tax, nor otherwise indicated any disapproval of the court decisions holding that the law did not subject interest-free demand loans to gift taxation.

As this Court has noted, Congress is presumed to be aware of judicial interpretations of a statute and to adopt such interpretations when the statute is re-enacted without material change. *E.g., Lorillard, Inc. v. Pons*, 434 U.S. 575, 580 (1978); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939). Here, this presumption is bolstered by the long-standing practice of the IRS prior to the mid-1960's, and after *Johnson* until 1973, of not attempting to impose the gift tax in connection with interest-free demand loans. In such instances, this Court properly has been most reluctant to accept any IRS contention that Congress intended something other than what has long been

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[13] Tax Treatment of Certain Payments, Pub. L. No. 89-365, 80 Stat. 32 (1966); Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539 (1966); Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969); Excise, Estate, and Gift Tax Adjustment Act of 1970, Pub. L. No. 91-614, 84 Stat. 1836 (1970); Internal Revenue Code Amendments, Etc., Pub. L. No. 93-625, 88 Stat. 2108 (1974); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976); Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981). Five of these statutes amended I.R.C. § 2501 itself, the section which imposes the gift tax. Pub. L. No. 89-809, § 109(a); Pub. L. No. 91-614, § 102(a)(1), (2); Pub. L. No. 93-625, § 14(a); Pub. L. No. 94-455, §§ 1902(a)(10), (c)(1), 1906(b)(13)(A); and Pub. L. No. 97-34, § 442(a)(1).

Additionally, technical amendments were made to the gift tax law by the Technical Corrections Act of 1982, Pub. L. No. 97-448, § 104(a), 96 Stat. 2365 (1983), which although formally enacted as part of the Act after the decision of the Court of Appeals below, were approved (without subsequent change) by the Senate Finance (Sept. 27, 1982) and House Ways and Means (Sept. 8, 1982) Committees before that decision (Nov. 1, 1982).

reflected in judicial decisions and administrative practice. *See Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 279-81 (1966); *United States v. Davis*, 370 U.S. 65, 71 (1962).

In the circumstances presented in this case, the conclusion which should be reached from the history of the gift tax statute and its administration is that the Congress has at no time intended to impose gift taxation in connection with interest-free demand loans.

B. Interest-Free Demand Loans Are Not "Transfers of Property by Gift."

It is the duty of this Court, of course, to interpret the tax statutes as they are written, interpreting the words used by Congress literally and in accordance with their ordinary, everyday meaning. *E.g., United States v. Byrum*, 408 U.S. 125, 136-37 (1972); *Commissioner v. Korell*, 339 U.S. 619, 627-28 (1950); *Crane v. Commissioner*, 331 U.S. 1,6 (1947). In so doing, courts will not extend the tax statutes by implication for the purpose of maximizing revenues for the government. *See, e.g., Caruth v. United States*, 566 F.2d 901, 904 (5th Cir. 1978). Indeed, this Court has refused to do so even when the result otherwise was a "windfall" to the taxpayer as a result of a "major tax loophole." *Hanover Bank v. Commissioner*, 369 U.S. 672, 682, 687-88 (1962); *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240 (1955). Where doubt truly exists as to the application or meaning of a statute, it must be construed strictly against the government and in favor of the taxpayer. *E.g., Gould v. Gould*, 245 U.S. 151, 152 (1917); *Peters v. United States*, 624 F.2d 1020, 1028 (Ct. Cl. 1980).

Viewed in light of these principles, it cannot fairly be concluded that a bona fide interest-free demand loan constitutes a "transfer of property by gift." Initially, it is undeniable that the

only "transfer," as that term is commonly used, which Paul or Esther Dickman made in this case was the "transfer" of money to Lyle or Artesian at the time that they made each demand loan. The IRS does not and cannot, however, claim that this transfer itself was an event subject to gift tax at that time as no "transfer of property by gift" had then occurred. *See* Rev. Rul. 73-61, 1973-1 C.B. 408. That transfer itself plainly did not convey to the borrower any right to use the money loaned for a definite period of time, or even for more than an instant. The lender was free to demand repayment prior to any effective use of the property by the borrower whatsoever. It was not the transfer of money, but only the failure to reclaim it over time, which could have any substantial value to the borrower or result in any substantial detriment to the lender.

Thus, it is clear that the IRS cannot effectively subject the making of the loan itself, the only "transfer of property" involved, to gift taxation. Any effort to do so, by artificially characterizing the loan as a transfer of money in return for a promise to repay that has a value less than the money transferred — an "unequal exchange" — must be rejected here for the same reasons stated by the Seventh Circuit in *Crown*. The gift tax law specifically provides that a "transfer of property by gift" must be valued for tax purposes "at the date of the gift." I.R.C. § 2512(a). Moreover, the Treasury Regulations require that "value" be determined by a marketplace standard reflecting the exchangeable value of the property transferred as of that date: "[T]he price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts." Treas. Reg. § 25.2512-1. As the *Crown* court noted, however:

> [F]rom a realistic point of view the value at the time the loan is extended of the right to repayment is both unknown

> and unknowable. The Commissioner has not produced any evidence showing that demand notes systematically trade at a significant discount from face value in the market place. Nor can a present discounted value formula be successfully applied given the absence of knowledge as to when the loan will be repaid. The most that can be said is that the eventual value of the notes expressed in terms of a present discounted value as of the time of the loan will range somewhere between zero and the face amount of the notes.

585 F.2d at 238 (footnotes omitted).[14] Thus, the characterization of an interest-free demand loan according to the "unequal exchange" theory of the IRS necessarily leads to a conclusion that there has been no "transfer of property by gift" under the gift tax law.[15]

An alternative IRS theory — one adopted by the Court of Appeals below (Pet. A. 11a-12a) — contains within it the same fatal flaw. This theory is that the making of an interest-free demand loan constitutes a present transfer of the "right to use property." Putting aside for a moment questions as to the

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[14] It should be noted that even these broad statements necessarily are based upon some economic assumptions that are not universally valid. In a society in which deposits in savings institutions are neither safe nor insured and economic conditions are highly unstable, a secure interest-free demand loan may have a greater value than interest-bearing bank deposits or less secure interest-bearing loans. While such economic circumstances may seem entirely unrealistic to us, they were not so unrealistic to the Congress which enacted the gift tax law on June 6, 1932, a year in which both prices and interest rates in the United States were falling. U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES; COLONIAL TIMES TO 1970; PART 1 211 (1975); BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING AND MONETARY STATISTICS 1914-1941 464 (1976).

[15] Certainly the retroactive valuation method espoused by the IRS — valuing the "gift" only as of the end of a period in which a loan has been outstanding — is irreconcilable with any theory that the making of an interest-free demand loan is itself a "gift," because valuation must be made under I.R.C. § 2512(a) "at the date of the gift."

validity of this characterization, the fact remains that this alleged "transfer of property" inherently has no measurable value at the date specified in the gift tax law as the one upon which the value of the gift must be measured — "the date of the gift." I.R.C § 2512(a). This is because the mere *use* of property has value *only* over time; unless there is some advance assurance that the use will continue for some period of time, the right to such use has no ascertainable value at its outset.

Thus, under either of these characterizations of the only "transfer" involved in making an interest-free demand loan, such a loan has no value under the present gift tax law which fixes both the time and the method for valuing gifts.

A third theory for treating interest-free demand loans as gifts, just as unavailing, has been advanced by the IRS. Under this theory, taxable transfers of the use of property, which allegedly is "property itself," occur continuously during a calendar quarter in which no demand for repayment of a demand loan is made. This theory, however, is at war with any ordinary concept of the term "transfer." That term connotes a discrete, affirmative act whereby a person conveys something to another person, not a continuous series of minute failures to require return of something loaned. There is no basis for concluding that such non-action is a "transfer" of property in the usual sense of that term — the sense in which we must conclude it was used by Congress.[16]

Similarly, whatever the borrower may have in a demand loan situation, it is not "property" as that term is ordinarily used. As this Court stated in *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (footnotes omitted):

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[16] In addition, to value such a "transfer" after the fact based on interest rates which were in effect during the calendar quarter is to ignore the demand feature of the loan. The borrower would have had to have been assured of the right to use the property for the calendar quarter in order for the loan to have had such a value when made.

> [T]he words of statutes — including revenue acts — should be interpreted where possible in their ordinary, everyday senses. The only relevant definitions of "property" to be found in the principal standard dictionaries are the two favored by the Commissioner, i.e., either that "property" is the physical thing which is a subject of ownership, or that it is the aggregate of the owner's rights to control and dispose of that thing.

We can readily concede that Congress in the gift tax law intended to encompass within the term "property" something more than "the physical thing." It intended to include the many kinds of intangible property long recognized by the law, such as choses in action, copyrights and accounts receivable. *See* I.R.C. § 2511(a). It intended to include equitable as well as legal interests, and property "however conceptual or contingent." *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943). *See also Commissioner v. Wemyss*, 324 U.S. 303 (1945). But it did *not* intend to elevate to the status of "property" every bare incident of property — such as the momentary use of property at the will of another. Such an incident of property is only a minute sliver of "the aggregate of the owner's rights to control and dispose" of that which he owns; it is not "property" itself in the ordinary sense.

This is shown most clearly by the statements of the Committees which reported the gift tax law to the House and Senate and which often have been cited as illustrative of the breadth of the reach of the law: "the term 'property' reaching every species of right or interest protected by law and having an exchangeable value." S. REP. NO. 665, 72nd Cong., 1st Sess. 39 (1932), *reprinted in* 1939-1 C.B. (Part 2) 496, 524; H. REP. NO. 708, 72nd Cong., 1st Sess. 27 (1932), *reprinted in* 1939-1 C.B. (Part 2) 457, 476. As broad as is this definition, it cannot extend, as the IRS would extend it, to every economic benefit

which one may have as a result of the act or omission of another. Specifically, it cannot be extended to encompass the "right to use money" pursuant to a demand loan, which the IRS claims is "property itself." Such a "right" is not protected by law in any respect. It may be withdrawn by the lender at any time for any reason or no reason, and the law will not impede that withdrawal under any circumstances. Indeed, the IRS's argument that such a "right" is "property itself" is an *ignis fatuus* which, in the absence of delineation by Congress, should be given no effect in our tax law.

C. "Property" Cannot be Equated to "Opportunity for Economic Benefit."

The attempt of the IRS to subject interest-free demand loans to gift taxation apparently is attributable to a desire to ensure that all means by which any opportunities for economic benefit pass between family members are subjected to the gift tax. The IRS is well aware of, and often emphasizes, the principle that a taxable gift may occur without the presence of every element of a common law gift, such as donative intent. *E.g. Fondren v. Commissioner*, 324 U.S. 18, 28 (1945). It also is aware that "the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title." *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43 (1939), *citing Burnet v. Guggenheim*, 288 U.S. 280, 287 (1933). What has been lost sight of, however, is that the tax still is imposed, as it was in 1932, upon the transfer of *property*, and not of mere economic benefit or the opportunity for such benefit. The two are not synonymous.

This principle is perhaps made most apparent by Justice Stone's opinion in *Bromley v. McCaughn*, 280 U.S. 124 (1929), in which the Court upheld the constitutionality of the 1924 gift tax statute, which imposed a tax on " 'the transfer . . . by

gift' . . . 'of any property wherever situated.' " 280 U.S. at 135. Justice Stone made it clear that not every exercise of property rights which provides actual or potential economic benefit to another is subject to tax, but only a single one:

> [The gift tax] is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be fully enjoyed free of the tax.

280 U.S. at 136-37. While it is true that an interest-free demand loan involves a "transfer," such "transfer" is a transfer by loan, not a transfer by gift. Thus, the power to lend property to another, or the unexercised power to charge interest or rental for its temporary use, were never the subject of the gift tax — even though the result might be some economic benefit to others.

Similarly, it cannot seriously be contended that Congress sought to tax the gift of valuable personal services provided within a family, despite the undeniable economic benefit which is thereby provided. For example, the IRS itself recognizes that an executor of an estate who waives fees or commissions — thereby saving money for the estate which passes to his son — makes no gift for gift tax purposes. Rev. Rul. 66-167, 1966-1 C.B. 20. *See* Rev. Rul. 70-237, 1970-1 C.B. 13. In *Commissioner v. Hogle*, 165 F.2d 352 (10th Cir. 1947), the court found no taxable gift where a taxpayer served without compensation as trustee of securities trading accounts for his children: "What, in fact and in reality, Hogle gave to the trusts in the taxable years was his expert services . . . . [T]here was no transfer directly or indirectly by Hogle to the trusts of property or property rights." 165 F.2d at 353-54.

When a lawyer writes a contract or will for his brother, when a doctor treats her adult daughter for illness, or when a skilled craftsman teaches his trade to his son, who can doubt that

economic benefit has passed? The provider of the benefit has foregone income which could have been earned by otherwise using his resources for profit, and the recipient has received something of value which otherwise would have cost substantial sums. Indeed, in the instance of the craftsman, the resulting economic benefits to the recipient may be lifelong and very great.

If the sole objective of the gift tax law is to ferret out the passage of economic benefit within families and subject it to tax, then each of these examples undeniably is a transaction which must be taxed. In the words of Judge Fay's concurrence in the Eleventh Circuit's decision below, the taxpayers in such instances "have given away no property, no interests, and no rights, but surely they have made a gift" (Pet. A. 13a). However, the fact that such provisions of benefit are not within the terms of the statute and have never been claimed to be taxable as a gift by Congress or the IRS demonstrates clearly that the passage of "economic benefit" within families is not the sole or even a sufficient condition for the imposition of gift tax.[17]

Thus, the argument of the IRS that similar economic benefits might have been passed to the borrowers with taxable results simply misses the point, as the Seventh Circuit in *Crown* noted. 585 F.2d at 237. Congress may someday choose to impose a gift tax upon all acts, or failures to act, which cause any type of economic benefit to pass to another for less than full consideration. Congress has not yet done so, however, and the IRS' contention in this case must be rejected since it is based on the erroneous premise that such is now the state of the law. Until the day when Congress adopts such a sweeping statute, citizens will be free to make use of their knowledge, their talents, and their property so as to benefit their children and close relatives

[17] This is also true in the income tax area. "Despite the importance of imputed income from services performed by taxpayers and their families, Congress has never sought to tax this source of economic gain." B. BITTKER, FEDERAL INCOME TAXATION OF INCOME, ESTATES AND GIFTS ¶ 5.3.2, p. 5-25 (1981).

without tax, so long as they do not "give the property owned to another." *Bromley v. McCaughn*, 280 U.S. at 136-37. They may do so with confidence that their actions will be given tax effect based on what actually was done, and not based on what might have been done.[18] *Central Tablet Manufacturing Co. v. United States*, 417 U.S. 673, 690 (1974); *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 148 (1974). Because Paul and Esther Dickman did not give their property to others, they owe no tax under the gift tax law as presently written.[19]

D. Taxation of Interest-Free Demand Loans as "Transfers of Property By Gift" Is Irreconcilable with Prior Positions of the IRS and Other Tax Law Provisions.

The earliest statement of the IRS with respect to interest-free loans was in Rev. Rul. 55-713, 1955-2 C.B. 23, involving imposition of income tax in connection with split-dollar life

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[18] This does not, of course, mean that the IRS must exalt form above substance and refrain from imposition of gift tax on every transaction cast as a loan. When a "loan" is in reality a gift, it may be taxed as such under the "sham transaction" or "economic substance" doctrines or related principles which this Court has clearly recognized. *E.g., Gregory v. Helvering*, 293 U.S. 465 (1935). This clearly is not such a case, and the IRS has made no claim to the contrary. *See* n. 2 *supra*. Even in such a case, however, the gift would be of the principal "loaned," not of some amount of claimed "interest." *See Estate of Kelley v. Commissioner*, 63 T.C. 321 (1974), *acq. and nonacq.*, 1977-2 C.B. 2; *Small v. Commissioner*, 28 T.C.M. (CCH) 1111 (1969).

[19] It is this failure to recognize the difference between the interpretation and enforcement of the gift tax statute as written by Congress, and the enforcement of a supposed policy to tax every type of event by which the opportunity for economic benefit is passed within a family, that lies at the heart of the decision of the Court of Appeals below. Judge Fay's very candid concurring opinion clearly reflected this approach:

> Taxpayers have given away no property, no interests and no rights but surely they have made a gift. Judge Hill has labored hard to find some "legal support" for this conclusion. When one lets another use large sums of money for no charge, who would doubt that there has been conferred a valuable gift? . . . Feeling that courts should avoid "slavish" interpretation of the Code . . . I join with Judge Hill.

(Pet. A. 13a-14a).

insurance, which was regarded as similar to an interest-free loan from the employer to the employees. The Ruling stated that "[t]he mere making available of money does not result in realized income to the payee or a deduction to the payor."[20]

In *Dean v. Commissioner*, 35 T.C. 1083 (1963), *nonacq.*, 1973-2 C.B. 4, the Tax Court decided a case involving interest-free loans of over $2,000,000 from a corporation to the taxpayers who were its predominant shareholders. The IRS claimed that the interest-free loans resulted in income to the taxpayers, measurable at the prime rate of interest, but the Tax Court rejected the contention: [W]e have not been directed to any case holding or even suggesting that an interest-free loan may result in the realization of taxable income by the debtor . . . ." 35 T.C. at 1089. The *Dean* case has since become the rule in the First, Second, Fourth, Fifth, Sixth, and Ninth Circuits.[21] Sporadic attempts by the IRS to impose tax on theoretical interest income to the lender in interest-free loans also have been rejected. *Brandtjen v. Kluge, Inc.* 34 T.C. 416 (1960), *acq.*, 1960-2 C.B. 4; *Society Brand Clothes, Inc. v. Commissioner*, 18 T.C. 304 (1952), *acq.*, 1952-2 C.B. 3; *Combs Lumber Co. v. Commissioner*, 41 B.T.A. 339 (1940), *acq.*, 1940-1 C.B. 2.

The law with respect to charitable deductions for income tax purposes is different from the gift tax law in that any "charitable

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[20] Rev. Rul. 55-713, 1955-2 C.B. 23, 24. The ruling was revoked and replaced by Rev. Rul. 64-328, 1964-2 C.B. 11, after the IRS concluded that split-dollar insurance plans were not the same as interest-free loans and analyzed their tax consequences in a different manner. Rev. Rul. 64-328, however, did not announce any alteration in the IRS' 1955 position as to the nontaxable consequences of interest-free loans.

[21] *Parks v. Commissioner*, 686 F.2d 408 (6th Cir. 1982); *Baker v. Commissioner*, 677 F.2d 11 (2d Cir. 1982); *Commissioner v. Greenspun*, 670 F.2d 123 (9th Cir. 1982); *Beaton v. Commissioner*, 664 F.2d 315 (1st Cir. 1981); *Martin v. Commissioner*, 649 F.2d 1133 (5th Cir. 1981); *Suttle v. Commissioner*, 625 F.2d 1127 (4th Cir. 1980). Only a trial judge in the Court of Claims has accepted the stubborn contention of the IRS in this regard. *Hardee v. United States*, 82-2 U.S.T.C. (CCH) ¶ 9459 (Ct. Cl. 1982), *appeal pending* (Fed. Cir.).

contribution" is deductible; no "transfer of property" is necessarily required.[22] Nevertheless, the IRS long took the position that a taxpayer was not entitled to a charitable deduction for permitting a charity to use his property, even for a substantial and fixed period. In I.T. 3918, 1948-2 C.B. 33, 34, the IRS claimed that the right to use property was not itself property, but only a "privilege": "[P]ermission to use and occupy property granted to [a charitable] organization . . . does not constitute a gift of property. It is merely the granting of a privilege for which no charge is made." In several cases since then, the IRS consistently, albeit unsuccessfully, argued that no charitable deduction was permissible because a right to the use of property even for a definite period was not "property."[23]

In the Tax Reform Act of 1969, the Congress made clear its intended result for the future in the charitable deduction area. The Act added new I.R.C. § 170(f)(3)(A)[24] to provide that an

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[22] I.R.C. § 170(a), (c). Moreover, Congress has long encouraged gifts to charity, and the Courts have held that the charitable contribution provisions should be interpreted liberally for this reason. *E.g., Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 384 (1937).

[23] *Threlfall v. United States*, 302 F.Supp. 1114 (W.D. Wis. 1969) (two and one-half months rent-free use of office building); *Passailaigue v. United States*, 224 F.Supp. 682 (M.D. Ga. 1963) (rent-free lease terminable on fifteen days' notice); *Thriftimart, Inc. v. Commissioner*, 59 T.C. 598 (1973), *acq.*, 1973-2 C.B. 4 (three-year rent-free lease on office building subject to revocation on sixty days' notice if owner sold building); *Allen v. Commissioner*, 57 T.C. 12 (1971) (five-year rent-free lease of land); *Sullivan v. Commissioner*, 16 T.C. 228 (1951), *acq.*, 1951-1 C.B. 3 (use of real estate to terminate at end of World War II). The Eleventh Circuit erroneously cited these cases and *Abbott v. United States*, 74-2 U.S.T.C. (CCH) ¶ 13,040 (S.D. Miss. 1974), suggesting that an interest-free demand loan constitutes "property" (Pet. App. 5a-6a). None of the cases, however, involved instantly terminable interests like a demand loan. In *Passailaigue*, where the interest could be terminated on fifteen days' notice, the court regarded the situation as "substantially the same as that presented in *Sullivan*" — where the use was for the duration of World War II. 224 F.Supp. at 687.

[24] Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1), 83 Stat. 487 (1969).

interest-free loan of money to a charity is not a sufficient transfer of the taxpayer's interest in the money to warrant a charitable contribution deduction. As stated by the IRS in Example (3) of Treas. Reg. § 1.170A-7(d):

> In 1971, D loans $10,000 in cash to a charitable organization and does not require the organization to pay any interest for the use of the money. Since D's contribution consists of a partial interest to which Section 170(f)(3)(A) applies, he is not entitled to a charitable contributions deduction . . . .

To appreciate the anomalies in the tax laws that would be created if this Court accepted the contention of the IRS here, one need only consider the case of an interest-free loan to a recognized charity. Under the gift tax laws, an outright gift of property or money to a charitable organization is taxable, but a gift tax charitable deduction exists under I.R.C. § 2522, so that there is no net gift and hence no gift tax. Under I.R.C. § 2522(c), however, the maker of an interest-free loan is not entitled to such a deduction. Thus, if this Court were to uphold the contention of the IRS here, an interest-free loan to the American Red Cross would result in a taxable gift, unrelieved by any deduction, and a gift tax would be payable. If the taxpayer simply gave the money to the American Red Cross, a charitable deduction from the taxable gift would be allowed under I.R.C. § 2522 and there would be no gift tax. In terms of the purposes of the gift tax statute, in terms of Congressional intent, and in terms of simple equity, such a difference in tax result would plainly be without justification. In interpreting a statute, the Court "should be slow to attribute to Congress a purpose producing such unequal treatment among taxpayers, resting on no rational foundation." *United States v. Gilmore*, 372 U.S. 39, 48 (1963).

Finally, imposition of a gift tax in connection with interest-free demand loans would be irreconcilable with a basic principle recognized by the Tax Court:

> [O]ur income tax system does not recognize unrealized earnings or accumulations of wealth and no taxpayer is under any obligation to continuously invest his money for a profit. The opportunity cost of either letting one's money remain idle or suffering a loss from an unwise investment is not taxable merely because a profit *could have been made* from a wise investment.

Crown v. Commissioner, 67 T.C. at 1063-64. Gift taxation of interest-free demand loan transactions can only be based upon a premise that such loans permit taxpayers to diminish not their actual estates or incomes, but their potential estates or incomes, and that such diminution may properly be discouraged or burdened by taxation. That premise is one that not only cannot be found in the gift tax law; it is one that finds no support in our estate or income tax laws either.

Had Paul and Esther Dickman invested the money which they loaned to Lyle and Artesian, they would have paid income tax on any profits they made and estate tax on any such profits which actually remained in their estates at their deaths. Had those investments not been profitable, they would not have paid income taxes on the "value of the right to use" the sums invested, nor would such an assumed "value" be included in their estates. We proceed in our tax system on the basis of what actually occurs rather than what might or could have occurred. We tax our citizens on their actual gains and losses, their actual estates and incomes. Unless this Court is now, by judicial decision, to depart from this basic principle, the contention of the IRS in this case cannot be accepted.

II. Adoption of the Contention of the IRS By This Court Would Result in Enormous Difficulties and Great Unfairness.

The breadth of the principle for which the IRS contends in this case is truly sweeping. If every occasion on which a person permits any use of his money or property for less than full consideration is a taxable gift, then taxable gifts are everywhere among us. Parents who permit their minor children to use any of the family's property have made a taxable gift to the extent that such use was not required to satisfy their legal obligation of support. Where children are permitted to go with their friends to the parent's vacation home in the summer, where a son is permitted to take the family car to a dance, and where a daughter is permitted to wear her mother's jewelry to that dance — all would be taxable gifts.

As to adult children or other relatives, *any* uncompensated use of their families' property would be taxable. The family who permits its twenty-one-year-old son to live at home in the summer during college has made a taxable "gift." A more sizable "gift" has been made by the couple who allows the widowed mother of one of them to live with them year-round. Any loan to adult children or to parents to help them through a difficult time would be within the same category.

The principle for which the IRS contends logically extends beyond interest-free loans, and would include every instance in which a person fails to maximize potential economic benefits. If a person on a drive with a friend is injured in an automobile accident because of the friend's negligence, a taxable "gift" would occur if the person chose to refrain from demanding full compensation from the friend. Where parents turn over management of the family business to their son and the business loses money because of his negligence, they would make a "gift" to him by not suing to recover the sums lost.

One need not consider such instances long in order to appreciate the burdens that such a state of the law would place on conscientious taxpayers. Each such "gift" would have to be noted, recorded, and somehow valued. In the common instance where a taxpayer has made true gifts to a child or other relative equal to or in excess of the annual exclusion amount ($3,000 in the years here at issue[25]), the taxpayer would be under the legal obligation to value and report to the IRS each and every use of his property by the donee for which he did not extract full market value. There would be a duty in such instance, enforceable by all of the sanctions available to the IRS, to report and value every weekend visit to the taxpayer's home, every outing in the taxpayer's car or boat, and even every loan of the taxpayer's lawn mower. I.R.C. § 6019.[26]

Our system of self-assessment simply cannot function in such a situation. In many and perhaps most instances, taxpayers would neglect to report such "gifts" either intentionally or because such transactions are so radically divergent from their conceptions of a taxable gift that they do not recognize any reporting obligation. In most instances, they would do so with impunity, because it would be impossible as a practical matter for the IRS to monitor the vast majority of such transactions. Any serious attempt to do so would intrude the IRS into everyday occurrences of family life to an extent that would be

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[25] The annual exclusion amount has been increased from $3,000 to $10,000 for 1982 and subsequent years. I.R.C. § 2503(b), *as amended by* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 441(a), 95 Stat. 172 (1981).

[26] This legal duty would even extend to the situation where parents make an interest-bearing demand loan to their daughter at a market rate, requiring the parties to carefully trace the ups and downs of the market rate during the year. If the market interest rate were to rise above the loan rate, the parents would have made a taxable gift to their daughter by not demanding payment so they could reinvest at a higher market rate. If the market interest rate were to fall below the loan rate the next week, the daughter would have made a taxable gift to the parents by not paying the loan and borrowing the money elsewhere at the lower market rate.

intolerable in our society. Indeed, the result would be wholly irreconcilable with our cherished conceptions of a zone of privacy into which government should not intrude even for the best of reasons.

The burdens of such a state of affairs would not be limited even to this extent. They would include tremendous difficulties of valuation, and a major increase in the amount of administrative and judicial effort required to resolve them. In the context of loans of money, there are difficulties which the IRS itself recognized in Rev. Rul. 73-61, 1973-1 C.B. 408: an appropriate rate of interest to be applied "may vary, depending upon the actual circumstances pertaining to the transaction." 1973-1 C.B. at 409. Under the gift tax law, value is measured by what the donor parts with, and not by what the donee receives. Treas. Reg. § 25.2511-2(a); *Bradford v. Commissioner*, 34 T.C. 1059, 1063 (1960), *acq.*, 1961-1 C.B. 4. In terms of the value of what the "donor" parts with, a demand loan is very different from a term loan. The lender parts with far more in a term loan than in a demand loan, where he has a right to recall the money to himself at any time he needs it or deems repayment to be insecure. Similarly, one borrower differs from another in ability to repay, and this affects the "value" of such a loan. Only an individualized process can take into account these and other factors which affect valuation, and that individualized process inevitably would involve tremendous effort, expense, and strain on administrative and judicial resources already overburdened by valuation and other disputes.[27]

An example of the great difficulties that would be entailed in valuing interest-free loans, and that are already beginning to clog our court system, is provided by a recently docketed Tax Court case, *LaRosa v. Commissioner*, No. 29632-82 (T.C., filed

[27] As of December 31, 1982, there was a backlog of 52,380 pending cases in the Tax Court, causing some taxpayers to wait at least a year and a half for their case to go to trial. The Wall Street Journal, Feb. 2, 1983, at 1, col. 5.

Dec. 22, 1982). In *LaRosa*, the IRS is asserting that the interest rates to be used to value the gift resulting from interest-free loans should fluctuate monthly. The IRS also is asserting that the applicable rates range up to 31.1 percent — interest rates that were "obtained by consulting with an expert witness." *LaRosa*, *supra*, Answer at ¶ 10. *LaRosa* spans five and one-half tax years and thus sixty-six calendar months. For each of these months testimony will be required to establish, at a minimum, market interest rates, local usury rates, the creditworthiness of the borrower as it changed from month to month, and any other appropriate adjustments called for by the circumstances. The difficulty of obtaining such information for periods that are five, ten or more years past will add to the burden.

To avoid these valuation burdens, the IRS would have to do what it did in the Tax Court and Court of Appeals below and in *Johnson* — ignore the necessity of individualized valuation in favor of the simple expedient of using one of the interest rates established in the Internal Revenue Code or the Treasury Regulations for another purpose. However, that choice serves only to emphasize, rather than conceal, the inherently arbitrary nature of any such crude benchmark. In *Johnson*, 254 F. Supp. at 76, the IRS used 3½ percent, the rate specified in the regulation tables then in effect for valuing annuities, life estates, terms for years, remainders, and reversions. Treas. Reg. § 25.2512-5 (T.D. 6334, 1958-2 C.B. 627, 653). In the instant case, the IRS used the interest rates established under I.R.C. § 6621 that were applicable for determining interest due on underpayments or refunds of tax for the years here involved, which ranged from 6 percent to 9 percent (Pet. A. 21a).[28] In yet a third arbitrary rate

[28] This theory would impose a 20 percent interest rate for loans outstanding in December 1982, Rev. Rul. 81-260, 1981-2 C.B. 244, a time when the prime rate was 11½ percent, 69 Federal Reserve Bulletin A27 (January 1983). Additionally, such 20 percent rate would violate some local usury laws. *E.g.*, FLA. STAT. § 687.02 (1981).

approach, in *Crown* the IRS simply asserted that a 6 percent rate was "reasonable" and therefore applicable. 67 T.C. at 1061.

These approaches have little or nothing to do with market measurements of value. Their inappropriateness is obvious, especially when it is remembered that Treas. Reg. § 25.2512-1 defines the measure of value to be used in determining the amount of a gift by reference to market transactions.

Further, the IRS' position would result in untenable anomalies with regard to interest-free loans to help a family member or friend pay college tuition or medical expenses. Under I.R.C. § 2503(e), payment of another person's college tuition or medical expenses is exempt from gift tax. If the IRS' position in this case is upheld, however, an interest-free loan made to that person to enable him to pay such expenses would result in a taxable gift. Thus families or friends wealthy enough to pay these expenses outright would not be subject to gift taxation while those who can only make a loan for the same purposes, because they will need the money later, would be subject to gift taxation. Congress cannot have intended such a result.

Another anomalous result is illustrated by considering an example involving a parent who has $25,000 and wishes to help her child through college and medical school. If the parent loans her child the $25,000 without interest and the IRS assumes an interest rate of twelve percent, the IRS would claim that "gifts" of $30,000 were made to the child if the parent demanded and obtained full repayment when the child was beginning his medical practice after ten years. If the parent instead simply gave the $25,000 to the child, however, the gift would only be in that lesser amount. It is obvious that the outright gift involves a more substantial gift and a greater diminution of the parent's estate than the bona fide loan. The theory of the IRS — which results in greater gift tax liability in the case of the loan — clearly is an erroneous one.

To these serious obstacles to any imposition of a tax on such transactions by judicial decision must be added the evident unfairness of that course to the Dickmans and thousands of other citizens who have made interest-free demand loans in the past. What was stated by the Seventh Circuit in *Crown* is equally true here:

> [O]ur hesitancy to adopt the result advocated by the Commissioner by judicial construction is reinforced by equitable considerations. *See Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 98 S.Ct. 917, 55 L.Ed.2d 82 (1978) (Brennan, J., concurring). Although we recognize that the Commissioner has broad discretion in applying a ruling retroactively . . . the Commissioner has only recently begun to assert that the making of non-interest bearing loans is a taxable event, even though the statutory authorities offered in support of that position have been in existence since the creation of the gift tax laws. When the Commissioner's position on the same issue involved in the case at bar was squarely rejected by the court in *Johnson v. United States*, 254 F.Supp. 73 (N.D.Tex.1966), no appeal was taken. Moreover, the Commissioner's nonacquiescence in that decision was not made public until seven years later, six years after the alleged gifts now before us were made. Until that time there was no administrative or judicial authority suggesting that interest-free demand loans would give rise to a taxable gift.

585 F.2d at 241 (citation and footnote omitted).

In this case, tax on the interest-free demand loans at issue was first assessed for 1971, a time at which neither the Congress nor any court had indicated that any gift tax consequences would result. Indeed, until November, 1982, no taxpayer could find any court which had ever done other than directly reject such a contention. To impose such consequences retroactively on the many taxpayers who, like the Dickmans, have made bona fide

intra-family loans for reasons unrelated to tax avoidance would violate basic equitable principles which have been observed with respect to the tax laws both by the courts and by Congress. The area of estate and gift tax planning is one in which good faith reliance on precedents is particularly likely to occur. *See United States v. Byrum*, 408 U.S. 125, 134 n.8 (1972). As succinctly stated in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 38 (1978) (Powell, J., concurring): "In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization." *See also United States v. Mason*, 412 U.S. 391, 399-400 (1973); *United States v. Davis*, 370 U.S. 65, 71 (1962).

III. If Interest-Free Demand Loans are to be Subject to Gift Taxation, it is the Congress Which Should Impose Any Such Tax.

Every court which has considered the issue at bar, with the exception of the Court of Appeals below, has echoed a single conclusion — imposition of any gift tax in connection with interest-free demand loans is properly a matter for prospective legislative or administrative action, rather than for retroactive judicial decision.[29] *Crown v. Commissioner*, 585 F.2d at 240-41;

[29] The Tax Court's consistent conclusions on the issues presented here are entitled to special consideration by this Court. The Tax Court — with its resources already seriously overburdened — is the court which would bear much of the brunt of the greatly increased litigation which inevitably would follow any judicial adoption of the theories asserted by the IRS here. More importantly, the Tax Court's special expertise in interpretation of the tax laws has long been accorded respect by this and other courts. *Dobson v. Commissioner*, 320 U.S. 489, 502 (1943); *Abkco Industries, Inc. v. Commissioner*, 482 F.2d 150, 155 (3d Cir. 1973).

> Where the statute is so indecisive and the importance of a particular holding lies in its rational and harmonious relation to the general scheme

Johnson v. United States, 254 F.Supp. at 77; *Crown v. Commissioner*, 67 T.C. at 1064; *Dickman v. Commissioner*, Pet. A. at 24a.[30] The concerns that led these courts to that conclusion include those which have been discussed herein: the absence of any evidence that such a tax ever was within the intendment of Congress, the impossibility of arriving at any rational valuation for such a tax under existing law, the confusion and insuperable difficulties, administrative and otherwise, which would attend any judicial imposition of such a tax, and the serious unfairness to individual citizens which would necessarily result.

These concerns can be further illustrated by reference to the actions of Congress in analogous situations. In the 1960's, for example, the IRS argued that a portion of the payments received in interest-free installment sales should be treated as interest rather than sales proceeds. In *Brown v. Commissioner*, 37 T.C. 461 (1961), *aff'd*, 325 F.2d 313 (9th Cir. 1963), *aff'd*, 380 U.S. 563 (1965), and *Pretzer v. United States*, 61-1 U.S.T.C. (CCH) ¶ 9477 (D. Ariz. 1961), the courts rejected the Commissioner's claims. As noted in this Court's decision in *Brown*, 380 U.S. at 578 n.9, the IRS then turned to Congress to overturn what it felt was an improper result. Congress responded in 1964 with legislation contrary to the proposals of the IRS in several respects, but including, in I.R.C. § 483, a mechanism for treating

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> of the tax law, I think great deference is due the twice-expressed judgment of the Tax Court. . . . [T]he Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs.

Arrowsmith v. Commissioner, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting).

[30] Similarly, each of the six United States Courts of Appeals that have considered the federal income tax consequences of interest-free loans have concluded that any such tax consequences should await Congressional action. *Parks v. Commissioner*, 686 F.2d 408 (6th Cir. 1982); *Baker v. Commissioner*, 677 F.2d 11 (2d Cir. 1982); *Commissioner v. Greenspun*, 670 F.2d 123 (9th Cir. 1982); *Beaton v. Commissioner*, 664 F.2d 315 (1st Cir. 1981); *Martin v. Commissioner*, 649 F.2d 1133 (5th Cir. 1981); *Suttle v. Commissioner*, 625 F.2d 1127 (4th Cir. 1980).

a portion of an installment sales price as interest in certain situations. It did so only after hearings which afforded to those affected an opportunity to voice their concerns. More importantly, it did so in a manner that illustrates the inherent advantages of comprehensive legislative treatment, for Congress excluded transactions which were limited in duration and scope, and added other rules, including "safe harbor" interest rates, to guide taxpayers considering installment transactions. *See* I.R.C. § 483(f); Treas. Reg. §1.483-1(c), (d).

If Congress wishes to impose a gift tax on interest-free demand loans, the incorporation of similar features would be desirable and practical. Of great significance is the fact that any such legislation would have an effective date and operate prospectively. Persons who have previously made interest-free demand loans would not be penalized retroactively for their actions and those who thereafter make such loans would do so with fair notice of their consequences. Moreover, Congress would almost certainly exclude from the reach of taxation a vast group of everyday transactions which plainly would be taxed if the broad rationale urged on this Court by the IRS were accepted. Finally, Congress could adopt specific and workable rules, including "safe harbor" interest rates, for the valuation of any loans or other uses of property which it determined to treat as "gifts."[31] Congressional action of this sort would well illustrate what this Court has long acknowledged:

> [T]he orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording . . . hearings and an opportunity to assist in the formulation of new legislation. . . . The whole scope of congressional action would be known long in advance and

[31] It should be noted that this level of flexibility would be unavailable in instances of administrative as well as judicial actions, because such refinements necessarily require legislative authorization.

> effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.

Radovich v. National Football League, 352 U.S. 445, 452 (1957). These considerations are particularly appropriate in the field of tax law:

> Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires reexamination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences.

United States v. Byrum, 408 U.S. 125, 135 (1972).

The installment sales area is, of course, only one of many instances in which the courts have "deem[ed] it wise to 'leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications.'" *Commissioner v. Brown*, 380 U.S. at 579, *quoting American Automobile Association v. United States*, 367 U.S. 687, 697 (1961). In some instances, Congress has specifically delegated to the IRS the authority to make regulations, prospective in effect, dealing with troublesome tax issues involving interest. For example, I.R.C. § 482 authorizes the IRS to distribute, apportion, or allocate gross income, deductions, credits, or allowances among commonly owned or controlled entities in certain circumstances. After an initial unsuccessful effort by the IRS to impute interest income to a subsidiary on interest-free loans to its parent, *Smith-Bridgman & Co. v. Commissioner*, 16 T.C. 287 (1951), *acq.*, 1951-1 C.B. 3, *clarified in* Rev. Rul. 67-79, 1967-1 C.B. 117, Congress directed the Treasury to consider development of specific regulations on

the subject. H. REP. NO. 2508, 87th Cong., 2d Sess. 19 (1962), *reprinted in* 1962-3 C.B. 1129, 1146-47. Regulations were proposed and, after public hearings, revised and finalized. The result again was a comprehensive treatment of the issue, with specific rules arrived at with public participation, affording a clear prospective guide for taxpayer conduct. Treas. Reg. §§ 1.482-1(d), 1.482-2 (proposed, 30 Fed. Reg. 4256 (1965); reproposed, 31 Fed. Reg. 10294 (1966); made final, 33 Fed. Reg. 5848 (1968), 34 Fed. Reg. 933 (1969)).

In other instances, such as the issue of taxation of fringe benefits provided to employees, a very different type of Congressional action has resulted. In that area, this Court had held that the statutory provision defining "gross income" was broad enough to encompass "any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." *Commissioner v. Smith*, 324 U.S. 177, 181 (1945). When the IRS promulgated proposed regulations to tax certain fringe benefits, however, Congress reacted with substantial concern. In 1978, Congress imposed a moratorium on any such regulations, Pub. L. No. 95-427, § 1, 92 Stat. 996 (1978) — one that has been extended successively through December 31, 1983. Pub. L. No. 96-167, § 1, 93 Stat. 1275 (1979); Pub. L. No. 97-34, § 807, 95 Stat. 172 (1981).

No one can predict with certainty which of these examples best illustrates the result which Congressional consideration of the issue now before the Court would engender. The reason is simple: the issue has never been presented by legislative proposal to Congress by the IRS or otherwise. But whatever the result, one can be confident that the outcome would be more comprehensive and flexible and more directly reflective of public will and Congressional tax policy than an *ad hoc* judicial decision. For these reasons, any claim by the IRS that interest-free demand loans are properly the subject of gift taxation should be directed to the governmental branch whose duty it is to fashion the tax law.

CONCLUSION

Neither the making of an interest-free demand loan nor the failure to demand repayment of such loan constitutes a taxable "transfer of property by gift." This had been the consistent interpretation of the gift tax law for some fifty years until the decision of the court below. A contrary holding will result in enormous administrative and judicial burdens and great unfairness to individual citizens. If interest-free demand loans are to give rise to gift taxation, it is the Congress which should mandate such a result.

Accordingly, the decision of the Court of Appeals should be reversed and the decision of the Tax Court affirmed.

Respectfully submitted,

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